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SUPERIOR COURT OF NEW JERSEY
MORRIS COUNTY
LAW DIVISION, CIVIL PART
DOCKET NO. L-2331-15

ASHLAND INC., INTERNATIONAL SPECIALTY PRODUCTS INC.; and ISP ENVIRONMENTAL SERVICES, INC.,

Plaintiff(s),

v.

G-I HOLDINGS INC.; BUILDING MATERIALS CORPORATION OF AMERICA d/b/a GAF MATERIALS CORPORATION; GAF CORPORATION; JOHN AND JANE DOES 1-20; and ABC COMPANIES 1-20

Defendant(s).

Decided: May 30, 2018

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FRANK J. DEANGELIS, J.S.C.

The current matter comes before Court by way of motions for summary judgment and cross motion to strike certain affirmative defenses. The underlying dispute stems from a claim for breach of an indemnification agreement. In the early 1950s GAF Corporation constructed a chlor-alkali plant at an industrial site in the Tremley Point section of Linden, New Jersey (the "LCP Site"). The operations of the former chlor-alkali plant and other activities at the LCP Site by GAF Corporation from approximately 1950 to 1972 resulted in the contamination of the LCP site with various hazardous substances, including mercury. GAF Corporation operated the plant until it sold the LCP site to Linden Chlorine Products, Inc. in 1972. In or about 1985 chlor-alkali manufacturing operations at the LCP site ceased.

In 1986, GAF Corporation transferred assets of its Chemical Division to its subsidiary GAF Chemicals Corporation. In 1989, GAF Corporation's assets and liabilities were transferred to two entities – Dorset and Edgecliff Inc. Both companies went through

a series of mergers and corporate restructuring with Edgecliff later becoming GAF Building Materials Corporation ("GAF BMC") and G-I Holdings ("G-I"), and Dorset later becoming GAF Chemicals Corporation with International Specialty Products ("ISP") as its subsidiary and ISP Environmental Services ("IES") as ISP's subsidiary. Both companies, however, retained certain environmental liabilities as a result of the 1989 liquidation of GAF Corporation.

In 1991, ISP assumed certain liabilities relating to the manufacture and sale of specialty chemicals at Linden, NJ from the second GAF Corporation and GAF Chemicals Corporation. In October 1996, GAF, G-I, G Industries, GAF Chemicals, and ISP Holdings entered into an indemnification agreement (the "Indemnification Agreement") in connection with spin-off transactions. In 2009, G-I entered into a Plan of Reorganization under Chapter 11 of the Bankruptcy Code. The 1996 Indemnification Agreement was assumed by G-I when the Plan was confirmed. On or around August 23, 2011, Ashland Inc. ("Ashland") acquired ISP Holdings and its subsidiaries, and is currently the parent company of ISP and IES. In or around 1994, the United States Environmental Protection Agency (the "EPA") began to investigate the LCP site due to documented releases of hazardous substances at the site through the years. In early 1999, EPA issued an AOC. IES and ISP voluntarily entered into the EPA AOC in 1999, as a Potentially

Responsible Party ("PRP") for the LCP site and voluntarily participated in the RI/FS from 1999 to 2014. In 2014, EPA issued a Record of Decision for cleanup of the LCP site with an estimated $36.3 million cost for the cleanup. On September 18, 2015, Ashland, Inc., ISP and IES ("Plaintiffs") sent G-I, GAF Corporation[1] and GAF BMC notice of a Claim of Environmental Liability based upon the natural resource damage assessment done by the federal agencies investigating the LCP Site and demanded indemnification under the Indemnification Agreement. Defendants refused to indemnify Plaintiffs for these costs.

On September 30, 2015, Plaintiffs filed a Complaint seeking a declaratory judgment that Defendants G-I, Building Materials Corporation of America, and GAF Corporation are in breach of the Indemnification Agreement and pursuant to the Indemnification Agreement must indemnify Plaintiffs for any costs or liabilities incurred in connection with the investigation and remediation of the LCP Site. On March 27, 2018, G-I and GAF Corporation ("Defendants") filed a summary judgment motion on the grounds that Plaintiffs' claims against them are barred by the bankruptcy discharge and that Plaintiffs should be estopped from disclaiming CERCLA liability for the LCP site on the basis of Plaintiffs' prior representations and positions. On April 19, 2018, Plaintiffs filed

[1] G-I and GAF Corporation (hereinafter "Defendants") are the only parties to this motion as GAF Building Materials Corporation was not a debtor in Chapter 11 Bankruptcy that is the basis of Defendants' present motion.

an opposition and cross-motion asserting that the bankruptcy proceedings do not shield Defendants from liability and that Defendants' estoppel arguments must be rejected. All issues have been fully briefed by the parties.

Under R. 4:46-2(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged, and that the moving party is entitled to a judgment or order as a matter of law." As the Brill Court explained, the "essence" of the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Brill v. The Guardian Life Insurance Co., 142 N.J. 520 (1995) (quoting Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 251-52 (1986)). Moreover, "on a motion for summary judgment the court must grant all the favorable inferences to the non-movant." Brill, 142 N.J. at 536. Although non-movants obtain the benefit of all favorable inferences, bare conclusions without factual support in affidavits or the mere suggestion of some metaphysical doubt as to the material facts will not overcome motions for summary judgment. R. 4:46-5; see also Brae Asset Fund, L.P. v. Newman, 327 N.J. Super. 129, 134 (App. Div. 1999) (requiring submission of factual support in affidavits to oppose summary judgment motion); Fargas v. Gorham,

276 N.J. Super. 135 (Law Div. 1994) (self-serving assertions alone will not create a question of material fact sufficient to defeat summary judgment motion); Heljon Management Corp. v. Di Leo, 55 N.J. Super. 306, 312 (App. Div. 1959) ("It is not sufficient for the party opposing the motion merely to deny the fact in issue where means are at hand to make possible an affirmative demonstration as to the existence or non-existence of the fact."). A non-moving party "cannot defeat a motion for summary judgment merely by pointing to any fact in dispute." Brill, 142 N.J. at 529. Therefore, if the opposing party only points to "disputed issues of fact that are 'of an insubstantial nature' the proper disposition is summary judgment." Id.

Defendants argue that Plaintiffs' claim for indemnification is precluded by the bankruptcy discharge because Plaintiffs were claimholders at the time of G-I's bankruptcy and they failed to seek any relief. Defendants submit that at the time of the bankruptcy Plaintiffs knew of the CERCLA claims that give rise to the present action. Defendants further argue that any claims discharged in bankruptcy proceedings include potential and unmatured contract claims and any other contingent claim. Thus, since the conduct that gave rise to the CERCLA liability predated G-I's bankruptcy petition, any claims that Plaintiffs had arising out of CERCLA liabilities were discharged in their entirety at the time of G-I's bankruptcy because Plaintiffs failed to seek any

relief for such claims or any further claims based upon the same activity. Plaintiffs contend that Defendants' indemnity obligations arise not out of environmental claims for liability under CERCLA that were discharged by the Bankruptcy Plan but out of an executory contract. Further, Plaintiffs argue that Defendants' assumption of the executory agreement effectively renewed the contract and its obligations, thus removing it from the bankruptcy discharge provisions.

The Bankruptcy Code defines a "claim" as "a right to payment, whether or not reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured; or a right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured." 11 U.S.C. § 101(5). The term "claim" is broadly construed under the Bankruptcy Code. Nobelman v. American Savings Bank, 508 U.S. 324, 331 (1993) ("[t]he unqualified word 'claim' is broadly defined under the Code"). The term 'claim' is [also] coextensive with the term "debt." Penn. Dep't of Public Welfare v. Davenport, 495 U.S. 552 (1990). A "debt" is a "liability on a claim." 11 U.S.C. § 101(12).

The determination of whether a claim is pre-petition or post-petition is of utmost importance in bankruptcy because if the claim arises pre-petition it can be discharged by the Chapter 11 debtor's plan of reorganization. See 11 U.S.C. § 1141(d)(1)(A) (stating that the confirmation of a plan discharges the debtor from debt arising before the date of plan confirmation). The Bankruptcy Code does not clearly establish when a right to payment arises, but caselaw has held that claims "arise[] ... when all transactions necessary for liability have occurred, regardless of whether the claim was contingent when the petition was filed." In re Myers, 362 F.3d 667 (10th Cir. 2004).

While Defendants argue that ISP's claims against G-I and GAF are environmental claims that accrued pre-petition, Plaintiffs contend that their claims are not environmental but, instead, indemnity claims arising under an executory contract, which was not discharged because it was assumed by Defendants. Defendants are correct that generally if not assumed, environmental claims are discharged. However, such is not the case here.

An executory contract differs from other pre-petition claims in that courts have held that the assumption of an executory contract requires performance of that contract "in full just as if the bankruptcy had not intervened." In re Frontier Prop., 979 F.2d 1358, 1367 (9th Cir. 1992). The term "executory contract" is not defined in the Code, but as the court observed in In re Exide

Techs., 340 B.R. 222, 229 (Bankr. D. Del. 2006), courts in this Circuit use the Countryman standard, which provides that a contract is executory when "the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing performance of the other." Vern Countryman, Executory Contracts in Bankruptcy: Part I, 57 Minn. L. Rev. 439, 460 (1973). See also Sharon Steel Corp. v. National Fuel Gas Distribution Corp., 872 F.2d 36, 39 (3d Cir. 1989).

Here, the Court concludes that the Indemnification Agreement is an executory contract. Although, the Court is cognizant that indemnification agreements are not always executory, courts look not to the type of the agreement but to the obligations under the agreement to determine whether the contract is an executory contract. See In re Van Dyk Research Corp., 13 B.R. 487, 503-06 (Bankr. D. N.J. 1981) (holding that debtor's indemnification obligation in purchase agreement, that that only required payment by the debtor, was not executory contract); see also Sharon Steel Corp. v. National Fuel Distribution Corp., 872 F.2d 36, 39 (3d Cir. 1989) (adopting the Countryman standard). The Court finds that the Defendants had ongoing, material, unperformed obligations to one another as of the commencement of the bankruptcy case. These obligations included reciprocal indemnification obligations. Therefore, unlike In re Van Dyk Research Corp. where the obligation

to indemnify was one-sided, the present Indemnification Agreement is executory.

Further, the Bankruptcy Code provides that a trustee or debtor in possession "subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a). Once an executory contract is assumed, a debtor is subject to the benefits and burdens of the contract. In re Fleming Cos., 499 F.3d 300, 308 (3d Cir. 2007). To affect the right to assume or reject a contract or lease, the pre-petition termination of said agreement must be complete and not subject to reversal either under the terms of the agreement or under applicable state law. In re Tudor Motor Lodge Assocs. Ltd. Partnership, 102 B.R. 936, 949 (Bankr. D.N.J. 1989). It is undisputed that no court has determined that the Indemnification Agreements was terminated prior to the filing of the bankruptcy petition. Nor do the parties dispute that there was no termination by way of a material breach of the Indemnification Agreement prior to the commencement of the bankruptcy. The entry of the Confirmation Order by the Bankruptcy Court constituted an order approving the assumptions of any executory contracts including the Indemnification Agreement pursuant to sections 365(a) and 1123 of the Bankruptcy Code. See e.g., In re Marple Publ'g Co., 20 B.R. 933, 934 (Bankr. E.D. Pa. 1982) ("if an unexpired lease is assumed by a debtor in possession under the Code, and such action is

approved by the court, such assumption creates a new administrative obligation of the estate which is payable as a first priority . . . . Equally important is the fact that such assumed obligation is a postpetition debt that is not discharged by a confirmation of a chapter 11 case, and it therefore continues to be an obligation of the reorganized debtor.”).

This outcome is not changed by the holding of Diamond, Cellnet and NCL cited by Defendants. Relying on In re Diamond Mfg. Co., 164 B.R. 189, 201 (Bankr. S.D. Ga.1994), the court in Cellnet concluded that “[w]here the nonbankrupt party has knowledge of facts sufficient to place the party on notice that a ‘potential’ pre-confirmation breach has occurred, res judicata bars that party from later asserting a claim based upon the pre-petition breach.” Here, however, breach of the Indemnification Agreement did not occur until after the confirmation. Furthermore, in NCL Corp. v. Lone Star Building Centers (Eastern) Inc., 144 B.R. 170, 178-79 (S.D. Fla. 1992), the court, in an environmental contamination matter, found res judicata barred a landowner's claim against a subsequent lessee where a predecessor lessee had assumed a lease in a bankruptcy proceeding and the owner had not raised pre-assumption defaults concerning lease provisions requiring compliance with legal and regulatory requirements at the time the bankruptcy court approved the lease assumption. The subsequent lessee, however, remained liable for any post-assumption

violations. Id. The Record of Decision from the EPA with an estimate of the cleanup costs was presented post-assumption, in 2014. There is also no dispute here that a demand for indemnification and subsequent refusal of indemnification occurred post-petition in 2015. Therefore, indemnification claims presented to the Court by Plaintiffs are based on post-assumption obligations and are not barred by res judicata.

As Plaintiffs point out, Defendants could have rejected the executory contract during the bankruptcy proceedings, but chose not to do so. The Plan did not expressly provide that all executory contracts, including the Indemnification Agreement, were rejected; Defendants did not dispute the effectiveness of the Indemnification Agreement; and Defendants specifically assumed the Indemnification Agreement prior to the commencement of the bankruptcy case. Therefore, the Court holds that under these facts, the Indemnification Agreement was not discharged in Defendants' bankruptcy proceedings.

Defendants also assert that Plaintiffs are now estopped from seeking indemnification for the CERCLA liability because Plaintiffs accepted responsibility for the LCP Site in the Environmental Coverage Action and failed to assert any potential claim with respect to the cleanup costs against Defendants in the bankruptcy proceedings. Judicial and quasi estoppel doctrines are narrowly construed and are generally reserved for extraordinary

circumstances that warrant their application to avoid a miscarriage of justice. Kimball International Inc. v. Northfield Metal Products, 334 N.J. Super. 596, 608 (App. Div. 2000), cert. denied, 167 N.J. 88 (2001). These doctrines are most often used to prevent a debtor from concealing potential causes of action from the court and deter misrepresentation of a debtor's financial reality in an effort to later recover on undisclosed interests. See, e.g., Krystal Cadillac-Oldsmobile GMC Truck Inc. v. General Motors Corp., 337 F.3d 314, 322-23 (3d Cir. 2003) ("The [Bankruptcy] Code requires that a debtor list potential causes of action, not claims it actually intends to sue on at the time of the required disclosure."); Seward v. Devine, 888 F.2d 957, 963 (2d Cir. 1989) ("The bankruptcy estate. . . includes any causes of action possessed by the debtor."); Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 417 (3d Cir. 1988) ("It has been specifically held that a debtor must disclose any litigation likely to arise in a non-bankruptcy contest.").

For example, in Oneida, the court determined that in light of the protections that the Chapter 11 process offers the debtor and the express statutory directives to disclose potential litigation, a debtor has a duty to disclose potential future litigation or causes of action that impact creditors' claims. Oneida Motor Freight, Inc., 848 F.2d at 417-18, 420. By failing to raise its potential future claims in its schedules, disclosure statement, or

reorganization plan, the court found that the debtor violated a duty of candor and effectively misrepresented that it never contemplated these claims. Id. at 418-19. The court further ruled that this misrepresentation impacted upon the creditor's decision to approve a settlement agreement and subsequent reorganization plan. Id. at 419. Accordingly, judicial estoppel barred the subsequent cause of action because the debtor successfully attained confirmation of its reorganization plan while remaining silent to its challenge to the creditor's underlying claims. Id. at 419-20.

In the present case, Plaintiffs voluntarily entered in an AOC, however, there is no evidence that Plaintiffs disavowed any indemnification obligations that were due to them for cleanup costs under the Indemnification Agreement and the Assumption Agreement. Moreover, the EPA's 104(e) Request for Information responses are not binding on the parties and thus, cannot be the basis for estoppel. See United States v. A & N Cleaners & Launderers, 842 F. Supp. 1543, 1549 (S.D.N.Y 1994) (finding that inconsistencies between information requests and answers to interrogatories do not eliminate a triable issue of fact). Moreover, there is no evidence that Plaintiffs have, in bad faith, concealed their indemnification claims from the Bankruptcy Court. On the contrary, the Indemnification Agreement was assumed by Defendants in bankruptcy, therefore, the parties had full knowledge of their

obligations under the Indemnification Agreement. Also, the Court notes that at the time of the bankruptcy proceedings, GAF, G-I, ISP and IES shared a legal department, prior to its post-bankruptcy acquisition by Ashland, which indicates Defendants' awareness of any potential claims and liabilities against them with respect to obligations prior and during the bankruptcy proceedings. In fact, Defendants previously presented the Court with letters from its own counsel indicating a potential dispute relating to the LCP Site liabilities. Under these facts, the Court finds no basis for the application of estoppel and quasi-estoppel doctrines.

Because the Indemnification Agreement was expressly assumed by the Defendants, the Agreement was not discharged. Therefore, Plaintiffs' claims are not barred by the bankruptcy discharge. Accordingly, Defendants' motion for summary judgment based on the bankruptcy discharge is DENIED; Plaintiffs' cross-motion to strike Defendants' affirmative defenses based on estoppel related to the bankruptcy discharge is GRANTED.